Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

JOHN DALEY AND WILLIAM MCGINNIS,

Petitioners,

v.

HARVEY RAMBO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether police officers who have effected an arrest in a sister state and have been held by the district court to have done so under color of law of their home state can be deprived of a decision on the merits of qualified immunity, a defense available to all other public officers who have acted under the color of law of their state.

2. Whether the Seventh Circuit violated both the letter and spirit of this Court's two-pronged qualified immunity analysis mandated by *Siegert v. Gilley* when its failure to address whether the defendant Illinois officers had left their office and color of law behind and acted as private citizens in arresting plaintiff misdemeanant within the territory of the State of Indiana (thus negating the state action required for violation of the fourteenth (and by incorporation, fourth) amendment), also led the Seventh Circuit to dismiss defendants' qualified immunity defense without review.

3. Whether the Seventh Circuit should be reversed and ordered to decide the merits of defendant Illinois officers' appeal from the denial of their qualified immunity defense when it dismissed the appeal for want of jurisdiction on the mistaken belief that defendants were claiming qualified immunity because they were private citizens, when, in fact, defendants claimed that they were entitled to qualified immunity only because, and after, the district court held that they had acted as public officials under color of law.

4. Whether police officers who serve within their home state in communities sharing a border with a sister state, and pursue a misdemeanant across the state border into the sister state, where they arrest the misdemeanant, have not, by crossing out of their home state, left their office and color of law behind and acted in the sister state

only as private citizens to be judged under the sister state's citizen arrest statute alone.

5. Whether the Seventh Circuit erred in holding that it did not have jurisdiction to decide an appeal from the denial of a motion for summary judgment on the issue of qualified immunity when the opponent produced no competent, admissible evidence in response on the material issue, the Federal Rules of Civil Procedure state that summary judgment "shall be entered" where the adverse party does not come forward with admissible evidence, and the holdings of this Court require any evidence in response to be more than a mere scintilla.

6. Whether the Seventh Circuit erred in creating a new rule of law within the Circuit (that a minimal injury is sufficient to support a fourth amendment excessive force claim) by footnote in an opinion dismissing the entire appeal for lack of jurisdiction.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, John Daley and William McGinnis, respectfully pray that a Writ of *Certiorari* be issued to review the opinion of the United States Court of Appeals for the Seventh Circuit entered on October 27, 1995 and the order of the United States Court of Appeals for the Seventh Circuit denying their request for rehearing entered on December 15, 1995.

OPINIONS BELOW

The opinions and judgment of the Seventh Circuit Court of Appeals in *Rambo v. Daley, et al. is reported at* 68 F.3d 203 (7th Cir. 1995), and reproduced in the Appendix at pages 1a-8a. A copy of the Court of Appeals order denying rehearing is reproduced in the Appendix at pages 28a. A copy of the District Court's September 1, 1994 unreported memorandum opinion and order is reproduced in the Appendix at pages 9a-14a. The memorandum opinion and order of the United States District Court dated May 10, 1994 is reported at 851 F.Supp. 1222 (N.D. Ill. 1994)and reproduced in the Appendix at pages 15a-27a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 27, 1995. The petitioners filed a timely request for rehearing which was denied on December 1[illegible] 1995. This petition for certiorari was filed within 90 days of December 15, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

U.S. Const., Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amendment XIV, Section 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § ⅜Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia

for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rules of Civil Procedure, Rule 8(e)(2):

A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

Federal Rules of Civil Procedure, Rule 56(c):

Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Federal Rules of Civil Procedure, Rule 56(e):

Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

Jurisdiction over Rambo's claims arising under the United States Constitution and 42 U.S.C. §1983 was conferred on the district court by 28 U.S.C. §1331 and 28 U.S.C. §1343. Jurisdiction over Rambo's state law claim was conferred on the district court by 28 U.S.C.§1367.

The only federal claim pending in this matter is Rambo's claim that the defendant Illinois officers applied excessive force when they arrested him in the state of Indiana.[1] No challenge has ever been made to the legality of the arrest itself.

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[1] Plaintiff had also claimed that the Illinois officers had been deliberately indifferent to his need for medical attention, a claim based on the same alleged injury as the excessive force claim. This claim was not substantiated by evidence, and summary judgment was entered dismissing

Force was applied when Rambo resisted his arrest for driving while under the influence and improper lane usage. Having spotted plaintiff in Illinois, the Illinois officers followed him and arrested Rambo in Hammond, Indiana, in the parking lot of DeLock's Liquor Store on April 5, 1991.

Rambo stated that there was no way defendant Daley was going to take him, and that defendant Daley had absolutely no right to do anything to him in Hammond, Indiana. Rambo claims he stated he wanted a Hammond police officer present. At a hearing on Rambo's motion to quash his arrest in the criminal proceeding, Rambo specifically testified:

A. They put me back by the back door of their squad car, and I refused to get in because I wanted a Hammond police officer present.

Rambo claims that after he refused to get into the squad car, he was hit in the ribs which caused him to bend down. This enabled one of the defendants to pull him into the squad car from behind, while the other defendant pushed him into the squad car.

After being charged, and released, Rambo arrived at the emergency room of St. Margaret's Hospital in Hammond, Indiana, at 12:02 a.m. on April 6, 1991 and complained only of numbness to his left wrist. At 1:05 a.m., Rambo's left hand/wrist was examined. Rambo was discharged 15 minutes later, at 1:20 a.m., after an Ace bandage was applied. Rambo presented no evidence of any follow-up treatment to his wrist.

Although Rambo's complaint alleges he sustained broken ribs, the medical records from St. Margaret's Hospital pertaining to treatment given Rambo on April 6,

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excessive force claim. This claim was not substantiated by evidence, and summary judgment was entered dismissing it. *Rambo v. Daley*, 851 F.Supp. 1222, 1227 (N.D. Ill. 1994).

The only thing submitted by Rambo, outside of his own conclusory affidavit, to support his claim of a rib injury was an unauthenticated bill purporting to contain a diagnosis and to reflect treatment on April 10, 12 and 16, 1991. Rambo's own affidavit fails to state that he received this bill from its purported source, the Whiting Clinic, or that he paid it. Moreover, the Whiting Clinic, responding to a subpoena of the District Court, submitted certified medical records that did not contain any record of the X-rays or treatment shown on the purported bill.

Rambo's own conclusory medical diagnosis contained in his affidavit--"I suffered two broken ribs from being punched in the ribs by the police officers on April 5, 1991"--is devoid of factual foundation. Rambo never claimed to be a medical expert.

Following his arrest, Rambo was never charged with any felonies. In the criminal proceedings arising out of his arrest, Rambo moved to quash and suppress on the ground that defendant Illinois officers had no authority to arrest him in Indiana. Judge Szwed agreed, ruling that defendants were acting as private citizens when they arrested Rambo in Indiana.[2] Specifically, Judge Szwed stated:

> Clearly in reviewing the facts of this case,...I find that the officer was acting in the status of a private citizen. The Indiana fresh pursuit law...clearly...rule[s] out affording Officer Daley any police powers because he was not arresting or pursuing the petitioner based on what was believed to have been the commission of a felony in

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[2] Citizens arrests are authorized for breach of the peace by Indiana statute. IND. CODE §35-33-1-4. Driving Under the Influence is a breach of the peace under the common law. *City of Troy v. Commins*, 159 N.E.2d 239 (Ohio Ct. App. 1958). (It is assumed that the common law of Indiana would be the same absent an Indiana case on point.)

not arresting or pursuing the petitioner based on what was believed to have been the commission of a felony in Illinois, and, therefore, he did not have the status of anything other than a private citizen.

The Illinois officers moved to dismiss Rambo's excessive force complaint on the grounds that the Illinois officers were not acting under color of law and, therefore, could not be found liable under the United States Constitution or §1983 of the Civil Rights Act. The District Court, however, denied defendants' motion. It held that the defendants were acting under color of law. The District Court, in doing so, failed to give a defensive collateral estoppel effect to the state criminal court's ruling that the defendant Illinois officers acted as private citizens in making the arrest in Indiana. *Rambo v. Daley*, 851 F.Supp. 1222, 1224-27 (N.D. Ill. 1994).

Having been held by the District Court to have acted under color of law, defendants thereafter filed a motion for summary judgment claiming two separate and distinct ground for qualified immunity. The Illinois officers claimed qualified immunity because although found to have acted as Illinois public officials while in Indiana, the law had not been clearly established in regard to their status in Indiana. Also, defendants claimed qualified immunity because the law was not clearly established that an arrestee has a right to be free from *de minimis* injury resulting from the limited force necessary to compel his entry into a squad car. In other words, Rambo's failure to submit competent evidence of broken ribs, on which his complaint rested, left him with, at best, a *de minimis* injury against which constitutional protection had not been clearly established.

The District Court denied defendants' qualified immunity defenses. Although the District Court believed that the application of force in the circumstances, absent broken ribs, could qualify for immunity, and although

described what was submitted as "thin"), it ruled against qualified immunity because it (1) thought that qualified immunity could not be founded on any uncertainty regarding color of state law, and (2) perceived a dispute of fact regarding whether the plaintiff sustained broken ribs.

Despite the Illinois officers' contention that they were entitled to qualified immunity because the District Court had held that they had acted under color of law and, therefore, as public officials, the United States Court of Appeals for the Seventh Circuit, placed its lack of jurisdiction to hear defendants' interlocutory appeal on the basis that defendants were claiming that they were entitled to qualified immunity because they were private citizens. The Seventh Circuit Court of Appeals also rejected the defendants' claim that they were entitled to qualified immunity because the law was not clearly established that an arrestee has a right not to suffer a *de minimis* injury during the course of an arrest. Although the Seventh Circuit recognized that "defendants' argument rests completely on the alleged failure of plaintiff to produce competent evidence of his broken ribs", the Court did not address the purely legal question of whether the evidence submitted by Rambo was competent. Instead, the Court determined that it did not "have jurisdiction to review a contention of insufficient evidence on interlocutory appeal." *Rambo v. Daley*, 68 F.3d 203, 207 (7th Cir. 1995).

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT CANNOT DEPRIVE DEFENDANTS OF TIMELY REVIEW OF THEIR RIGHT TO QUALIFIED IMMUNITY AFTER

I. THE SEVENTH CIRCUIT CANNOT DEPRIVE DEFENDANTS OF TIMELY REVIEW OF THEIR RIGHT TO QUALIFIED IMMUNITY AFTER THE DISTRICT COURT HELD THEM TO BE ILLINOIS PUBLIC OFFICIALS ACTING UNDER COLOR OF LAW BECAUSE, AT AN EARLIER STAGE IN THE LITIGATION, THEY HAD DEFENDED ON THE BASIS THAT THEY WERE PRIVATE CITIZENS ONCE THEY HAD LEFT ILLINOIS AND ENTERED INDIANA'S JURISDICTION.

For lack of jurisdiction, the Seventh Circuit dismissed defendants' appeal from the denial of qualified immunity. The Seventh Circuit held it lacked jurisdiction because of the defendants' previous, although unsuccessful, defense that their actions in Indiana could not, as a matter of law, have been under color of Illinois law. In claiming a want of jurisdiction to reach and rule upon defendants' appeal, the Seventh Circuit disregarded defendants' right to plead in the alternative under the Federal Rules of Civil Procedure, 28 U.S.C., Fed.R.Civ.P. 8(e)(2), and ignored this Court's decision in *Siegert v. Gilley*, 500 U.S. 226 (1990).

In *Siegert*, this Court defined two issues that appeals courts must confront and decide on an appeal from a denial of qualified immunity, and set the order in which they are to be taken up. The first issue of the two-step analysis established in *Siegert* is the determination of whether there is any constitutional right involved. In the case at bar, the Seventh Circuit should have reviewed and determined as a matter of law whether defendant Illinois police officers could correctly be held to have acted under color of Illinois law beyond Illinois' borders in the State of Indiana. If the acts of the defendant Illinois police officers cannot be said to have been the acts of the State of Illinois within Indiana,

the United States Constitution (or principles of the fourth amendment incorporated therein).

Defendants contended as a matter of law that they could no more have acted in Indiana under color of Illinois law (and their actions constitute Illinois state action in Indiana) than the Queen of England could be said to authorize an arrest in Indiana solely by dint of her crown. (Indeed, plaintiff himself successfully argued, in his position as criminal defendant in the Circuit Court of Cook County, that these officers had acted only as private citizens in Indiana.) If defendants' and plaintiff's prior contention is correct, the district court committed error in holding them subject to the Civil Rights Act, and the Seventh Circuit should have reversed as a matter of law. Under these circumstances, there would be no need for the application of qualified immunity.

This is exactly the logic behind the two-step analysis established by this Court in *Siegert*. As this Court stated in *Siegert*:

A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.

* * *

This case demonstrates the desirability of this approach to a claim of immunity, for Siegert failed not only to allege the violation of a constitutional right that was clearly established at the time of Gilley's actions, but also to establish the violation of any constitutional right at all. *Siegert v. Gilley*, 500 U.S. 226, 232, 233 (1991).

Siegert and its logic, however, were ignored by the Seventh Circuit in the case at bar. Under the logic of *Siegert*, the Seventh Circuit should have considered, as part

Siegert and its logic, however, were ignored by the Seventh Circuit in the case at bar. Under the logic of *Siegert*, the Seventh Circuit should have considered, as part of its review of the District Court's denial of defendants' qualified immunity defense, whether defendant police officers had acted under color of Illinois law within Indiana's jurisdiction. And, only if it found that the District Court was correct regarding color of law would it then have confronted the same color of law issue from the slightly different perspective of whether all reasonable officers would have understood that their acts in a foreign state were taken under color of law of their home state.

The "under color of law" element of a civil rights action equates to the fourteenth amendment's requirement of state action, particularly where, as in the case at bar, the defendants are sued as state officers. *Luger v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 926 (1982) ([T]he Due Process Clause protects individuals only from governmental and not from private action..."); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) ("In 1883, this Court...affirmed the essential dichotomy set forth in [the Fourteenth] Amendment between deprivations by the State, subject to scrutiny under its provisions, and private conduct, however discriminatory or wrongful, against which the Fourteenth Amendment offers no shield"); *Ex parte Virginia*, 100 U.S. 339, 347 (1879) ("[T]he prohibitions of the Fourteenth Amendment are addressed to the States"). (Likewise, legal uncertainty as to whether an officer is acting "under color of law" is legal uncertainty as to whether his act can be a violation of constitutional right.)

If the State of Illinois itself cannot be held to have acted in territory outside of its jurisdiction, and within that of Indiana, then defendants must justify their acts under Indiana state law, such as by an Indiana citizen's arrest statute, or be liable under Indiana tort law. But as private citizens, they could not be held liable under the federal

then, a civil rights action lies, and qualified immunity becomes available to the public officers sued.

When the District Court denied defendants' motion to dismiss, based on lack of color of law, the effect of that District Court ruling was to recognize defendants as state officers. As state officers, defendants were entitled to raise qualified immunity. The District Court's denial of qualified immunity, and the Seventh Circuit's failure to review that denial on its merits because the defendants had originally, though unsuccessfully, defended on the basis that they had not acted under color of law, deprives defendants, as public officers, of the important right to have immunity considered, violates the holding in *Siegert*, and disregards the Federal Rules of Civil Procedure provision that permits alternative pleading.[3] (28 U.S.C. Fed.R.Civ.P. 8(e)(2).)

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[3] The Appellate Court's error seems to be the product of a confusion of defendants' initial claim they were not acting under color of law in Indiana with their later claim of qualified immunity. Despite (1) the fact that defendants only sought qualified immunity after they were held to have acted under color of law and, therefore, as public officials; and (2) defendants' repeated statements in their briefs and oral argument that they were claiming qualified immunity because they were public officials and not because they were citizens, the Appellate Court persisted in its mischaracterization of defendants' defense as one where citizens were claiming qualified immunity. The Seventh Circuit's mischaracterization of defendants' qualified immunity defense is as intolerable as its decision to ignore the analysis required by *Siegert v. Gilley*, 500 U.S. 226 (1991). Even if this Court should choose not to undertake a full hearing of this matter on the merits it should, at a minimum, exercise its supervisory jurisdiction and remand the matter to the Seventh Circuit Court of Appeals for a decision which is actually in accordance with the true facts

It is difficult to see how the Seventh Circuit could claim that it could not reach the merits of defendants' appeal for lack of jurisdiction when its occasion, and the steps presented for review, were those recognized as proper and necessary by this Court in *Siegert*. This Court would not place circuit courts under an obligation that was beyond their jurisdiction to perform and fulfill.

Furthermore, the defendants' appeal was in substance no different than qualified immunity appeals by other civil rights defendants, including Gilley in the *Siegert* case. Almost every civil rights defendant starts with the defense that he or she did not violate the rights of the plaintiff, and then buttresses that defense with a claim of qualified immunity. This very situation can be seen from the procedural facts set forth in *Siegert v. Gilley*, 500 U.S. 226 (1991). In that case, this Court observed:

> Gilley filed a motion to dismiss or in the alternative for summary judgment. He contended that Siegert's factual allegations, even if true, did not make out a violation of any constitutional right. Gilley also asserted the defense of qualified immunity under *Harlow*, ...contending that Siegert's allegations did not state the violation of any "clearly established" constitutional right.

Id., at 229. The situation at bar is not any different.

Because state action is a prerequisite to a constitutional violation, a public officer who has not acted by virtue of color of state law has not committed a constitutional violation. When these defendants argued that, as a matter of law, they acted as private citizens, they were merely defending by stating, as Gilley had, that they

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minimum, exercise its supervisory jurisdiction and remand the matter to the Seventh Circuit Court of Appeals for a decision which is actually in accordance with the true facts and contentions of the defendants.

prevent this Court from taking review of the denial of his qualified immunity defense. Therefore, when the Seventh Circuit decided that it did not have jurisdiction to follow the path taken by this Court in *Siegert*, and the two-step analysis established therein for future appeals of like kind, it was acting inconsistent with, and in violation of, the authority of this Court.

If there is no review of the defendants' qualified immunity defense at this time, then other statements of procedure and policy established by this Court are also violated. This Court has repeatedly stated the importance of determining the issue of qualified immunity at the earliest possible time. Only by deciding the issue of qualified immunity at an early stage, can the distraction of public officers from their duties, unnecessary expense, and other negatives of prolonged litigation on public employment and the enforcement of the law be avoided. *Malley v. Briggs*, 475 U.S. 355, 341 (1986) ("The *Harlow* standard is specifically designed to avoid excessive disruption of government and permit the resolution of many and substantial claims on summary judgment..."); *Mitchell v. Forsythe*, 472 U.S. 511, 526 (1985) ("Indeed, *Harlow* emphasizes that even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be particularly disruptive of effective government'"); *Harlow v. Fitzgerald*, 357 U.S. 800, 814 (1982) ("The social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrents of able citizens from acceptance of public office"). These cases, and other cases to similar effect, can only be vindicated by review of the dismissal of defendants' appeal.

The Seventh Circuit failed to follow the direction and precedents of this Court, and do its duty to review the defendants' appeal from the denial of qualified immunity. This Court would not, by its decision in *Siegert* or otherwise, authorize or order courts of appeal to act in a

defendants' appeal from the denial of qualified immunity. This Court would not, by its decision in *Siegert* or otherwise, authorize or order courts of appeal to act in a manner that exceeded their jurisdiction, and this Court should not permit the Seventh Circuit to dodge, avoid or delay the merits of the defendants' appeal. For all of the reasons stated above, this Court should grant this Petition for Writ of *Certiorari*, review the Seventh Circuit's decision and remand this case to the Seventh Circuit for a determination on its merits.

II. THIS COURT SHOULD GRANT *CERTIORARI* TO ESTABLISH THE STATUS THAT POLICE OFFICERS OF ONE STATE HOLD (IN THE ABSENCE OF A SPECIAL PURSUIT STATUTE) WHEN THEY FOLLOW NON-FELONY SUSPECTS OUT OF THEIR STATE AND ARREST THEM WITHIN THE TERRITORY OF A NEIGHBORING, FOREIGN STATE.

Whether an officer acts under color of law when he or she follows a misdemeanant across the border into a sister state is an issue which affects every police department located at or near a state border. Although the Uniform Hot Pursuit Act instructs officers from a sister state as to what their status is when they are pursuing a fleeing felon across state lines, there is no such statutory guideline when the offender who is running across the border is a misdemeanant. The failure of the Seventh Circuit to address the issues raised before it denies those police officers who serve near state borders a needed guide regarding their status or capacity while in pursuit of a non-felon in a neighboring state in the absence of an applicable hot pursuit statute. Should an officer stop at the border and ignore the citizen's general moral obligation to prevent innocent bystanders from being run down by a

should the officer be exposed to a civil rights action or only to the neighboring state's tort laws? Certainly, he should not be forced to act in an area where the law is not settled[5] and then be deprived of the protection afforded by qualified immunity because the Seventh Circuit withheld the analysis required by this Court.

This case presents the very type of question which this Court should answer--a question national in its import and an answer which is needed to aid law enforcement officers to know their rights and obligations. The threat of the unknown generally paralyzes those who would otherwise be willing to act, to the detriment of the administration of justice. The same great public interest and the same policy reasons that lie behind an early determination of qualified immunity also calls for the resolution of this issue. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) (recognizing that qualified immunity is necessary to prevent "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service").

"Had Daley and McGinnis, believing Rambo thoroughly stewed, simply returned to Illinois, leaving the drivers and pedestrians of Indiana to fend for themselves, we might be justifiably disappointed or even appalled." *Rambo v. Daley*, 851 F.Supp. 1222, 1227 (N.D. Ill. 1994).

[5] Absent an authoritative expression of law regarding the status of defendant Illinois police officers outside of their state, in Indiana, the defendants are entitled to qualified immunity. Because action under color of law is an essential element to a violation of a federal constitutional right, the unsettled state of the law regarding whether the defendants' actions in Indiana were under color of state law, and therefore even capable of violating plaintiff's federal constitutional rights entitles defendants to qualified immunity.

governmental duties, inhibition of discretionary action, and deterrence of able people from public service").

There is no question that the defendant Illinois officers' status in Indiana needs authoritative federal resolution. State cases and district court cases cited and presented below, with only one exception, all demonstrated that police officers acting outside of the borders of their respective home and empowering states are considered to have acted as private citizens. For example, in *Firman v. Abreu*, 691 F.Supp. 811 (S.D. N.Y. 1988), which was, like the case at bar, a warrantless traffic arrest by the officer of one state in the territory of another, the court stated:

> It is undisputed that all the acts took place in Connecticut where *Abreu* had no authority to act. Plaintiff argues, however, that *Abreu* was acting under color of state law because at the time of the act in question, *Abreu* was on duty, in uniform, in his patrol car, and was financed by and under the control of the state of New York. Their argument must be rejected.
>
> Although it is true that state officials can act under color of state law even if they overstep their authority, (citation omitted), that rule can have no application where, as here, the official has no colorable authority to act in a jurisdiction in which he purports to act.

Id. at 813. *See also*: *State of New Hampshire v. Goff*, 393 A.2d 562, 565 (N.H. 1978) ("The territorial jurisdiction of New Hampshire police extends *only* to the borders of the sovereign state of New Hampshire"); *State of Iowa v. O'Kelly*, 211 N.W. 2d 589, 595 (Iowa 1973), *cert. denied*, 417 U.S. 936 (1974) ("When the Omaha officers came to Iowa, they ceased to be officers, but they did not cease to be persons. An officer who seeks to make an arrest without

338 N.W. 2d 120, 121, 122 (1983) ("As a general rule, a police officer acting outside his or her jurisdiction does not act in his or her official capacity and does not have any official power to arrest. (Citation omitted.) A police officer may, however, make a lawful arrest even when he or she is acting beyond his or her official capacity. * * * The Chicago officers were private citizens entitled to arrest defendants when they observed them commit a burglary in their presence").

The Seventh Circuit has also indicated this to be the position within the Seventh Circuit. *Gibson v. City of Chicago*, 910 F.2d 1510, 1518 (7th Cir. 1990) ("[O]ne cannot misuse power that one no longer possesses"); *Askew v. Bloemker*, 548 F.2d 673, 677 (7th Cir. 1976) ("[H]e could not have acted under color of state law at the Askew residence in Collinsville, Illinois, as it was outside his jurisdiction as a St. Louis Police officer"); *Cf: Chicago's Last Dept. Store v. Indiana Alcoholic Beverage Comm'n*, 161 F.Supp. 1, 4 (N.D. Ind. 1958) (cited with approval in *Askew v. Bloemker*, 548 F.2d 673, 677 (7th Cir. 1976) ("[T]hese named defendants (Indiana officers} are not acting as officers of Indiana but are acting in a private capacity while within the jurisdictional limits of the State of Illinois").

Furthermore, the very plaintiff in the case at bar, as a criminal defendant, successfully raised and argued that the defendants in this case acted as private citizens in order to get the criminal charges against him dismissed. Indeed, Rambo has cited only one case which has held to the contrary, and that case is distinguishable on its facts in that the officers were serving a warrant of undisclosed origin (the decision was not made clear whether the warrant was issued by the officers' home jurisdiction or by the local jurisdiction in aid of the foreign jurisdiction), and involved a foreign citizen who, unlike the plaintiff at bar, did not know his rights and was affirmatively misinformed

a foreign citizen who, unlike the plaintiff at bar, did not know his rights and was affirmatively misinformed concerning them. *Brzozowski v. Randall*, 281 F.Supp. 306 (E.D. Pa. 1968).

The district court's decision, which the Seventh Circuit's dismissal of the appeal for want of jurisdiction leaves open to question, sidesteps this collection of authority and appears to create a substitute, apparent color of law theory. Can the defendants be held to have seemed to act under color of law for purposes of the Civil Rights Act and yet be denied qualified immunity on the ground that they were really acting as private citizens? Can defendants be treated on the merits as though they had no right to act at all on some theory that, although they possessed apparent color of law, they lacked real authority to act for the state?

The Seventh Circuit should not be allowed to avoid a decision on the merits based on some unstated bias that the Constitution is a font of tort law and the only sufficient vehicle for protection against all manner of perceived wrongs. Actions in Indiana not under color of state law are still subject to liability under state common law if wrongly performed. Indeed, the public could perhaps be even more protected because officers might be strictly liable under Indiana tort law, assuming they committed a wrong.

This Court should hear this matter to decide the important issue of whether public officers of one state can violate the federal Constitution while in the territory of a foreign state in pursuit of a misdemeanant.

III. THE SEVENTH CIRCUIT MISAPPLIED THIS COURT'S DECISION IN *JOHNSON V. JONES* WHEN IT HELD THAT IT DID NOT HAVE JURISDICTION OVER AN INTERLOCUTORY QUALIFIED IMMUNITY APPEAL IN WHICH THE ONLY ISSUE TO BE DECIDED WAS THE PURELY LEGAL QUESTION OF WHETHER THE PLAINTIFF HAD

EVIDENCE IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

In *Johnson v. Jones*, ___ U.S. ___, 115 S.Ct. 2151 (1995), this Court held that a district court's findings of disputed material fact precluded defendants from immediately appealing the denial of their qualified immunity defense. The Supreme Court in *Johnson* stated that its earlier determination, in *Mitchell v. Forsythe*, 472 U.S. 511 (1985), that an immediate appeal can be taken from the denial of a qualified immunity defense only "refers specifically to a District Court's denial of a claim of qualified immunity, to the extent it turns on the issue of law." *Johnson*, 115 S.Ct. at 2156. There is no question that *Johnson* involved a disputed question of fact. In *Johnson*, the plaintiff brought an excessive force claim against five policemen. Three of the officers moved for summary judgment, contending that *Jones* could neither point to evidence that any of them had beaten him nor been present. In contrast, *Jones* could point to admissions in the depositions of these three officers which showed that they were present at the arrest and in or near the booking room at the time when *Jones* claims he was allegedly beaten. *Id.* at 2153-54. And, Jones submitted deposition testimony in which he swore that unidentified officers had used excessive force when arresting him, and again in the booking room at the station house. Accordingly, a genuine dispute of fact arose on competent and admissible evidence as to whether Jones was beaten in the presence of the three officers seeking summary judgment, who at a minimum had a constitutional obligation to prevent other officers from imposing an unconstitutional beating.

This is not true of the case at bar. The Seventh Circuit misapplied *Johnson v. Jones* to the situation in the case at bar, a situation that does not require the weighing of evidence or involve a genuine dispute of material fact.

evidence or involve a genuine dispute of material fact. Although the Seventh Circuit was correct in determining that defendants' qualified immunity argument "rests completely on the alleged failure of the plaintiff to produce competent evidence of his [claimed] broken ribs,"[6] *Rambo v. Daley*, 68 F.3d 203, 207 (7th Cir. 1995), it erroneously confused this legal question of whether Rambo's evidence was competent and could be considered on summary judgment with a dispute between admissible pieces of evidence. The Seventh Circuit mistakenly transformed a legal dispute into a question of fact, and consequently mistakenly held that it had no jurisdiction to decide defendants' qualified immunity appeal.[7] *Id.*

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[6] That plaintiff complained of numbness to his wrist when he went to the hospital after being released from custody does not save plaintiff's claim. Evidence which, at best, shows that an arrestee sustained some pain or discomfort as a result of being handcuffed does not establish a constitutional excessive force claim. *Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990) ("Claim of nerve damage as a result of handcuffs being too tight is insufficient to support an excessive force claim where plaintiff failed to submit medical records showing a long-term injury); *Hannula v. City of Lakewood*, 907 F.2d 129, 132 (10th Cir. 1990) (evidence that handcuffing caused pain is insufficient); *Brumfield v. Jones*, 849 F.2d 152, 156 (5th Cir. 1988) (assertion that handcuffing caused discomfort does not establish an issue of material fact for an excessive force claim). *See also*, *Van Houten v. Baughman*, 633 F.Supp. 887, 891 (C.D. Ill. 1987) (pain because of handcuffing and continuing occasional numbness in one hand does not shock the conscious of the court). Furthermore, the actual pleaded basis of plaintiff's action was not any *de minimis* injury to his wrist but no less than broken ribs.

[7] Although the Court based its decision on

The Seventh Circuit's decision contravenes this Court's longstanding, well-established rules regarding summary judgment and eviscerates defendants' rights under the Federal Rules of Civil Procedure. 28 U.S.C. Fed.R.Civ.P., 56(e)("When a motion for summary judgment is made and supported as provided in this rule, an adverse party...must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party"). Once the defendants filed a motion for summary judgment showing that Rambo did not sustain the averred broken ribs, Rambo bore the burden of submitting competent, admissible evidence to show that he, in fact, sustained a constitutionally cognizable injury. Yet, in response to defendants' motion for summary judgment, Rambo failed to submit any competent, admissible evidence of his allegedly broken ribs.

Since broken ribs are internal injuries which are not obvious to the senses, readily apparent or diagnosable by a

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step of setting forth a new rule of law in a footnote. The Court cited *Titran v. Ackman*, 893 F.2d 145, 147 (7th Cir. 1990) for the proposition that a significant injury is not required for a Fourth Amendment excessive force claim. *Titran*, however, was an excessive force claim that arose out of a pre-trial detention. It involved general due process concepts and not the fourth amendment. Further, to the extent Titran found that a severe injury was not required, it relied on *Williams v. Boles*, 841 F.2d 181 (7th Cir. 1988), an excessive force claim arising out of the Eighth Amendment. In light of this Court's statement in *Graham v. Connor*, 490 U.S. 386, 398 (1989) that "differing standards under the Fourth and Eighth Amendments are hardly surprising," it is patently improper for the Seventh Circuit to establish a new rule to be applied in fourth amendment excessive force claims by citing case law arising under other constitutional provisions.

Since broken ribs are internal injuries which are not obvious to the senses, readily apparent or diagnosable by a layman, Rambo's conclusory statements in his affidavit that he sustained broken ribs did not constitute competent evidence. Rambo did not claim to be a medical expert, and, therefore, was not competent to make any conclusions about his medical diagnosis. *Gong v. Hirsch*, 913 F.2d 1269, 1274 (7th Cir. 1990) (physician's letter which expresses a patient's conclusion as to the appropriate medical diagnosis was properly rejected by the trial court); *Risher v. Office of Workers' Comp. Program*, 940 F.2d 327 (8th Cir. 1991)("ALJ properly refused to consider lay testimony, and properly disregarded diagnosis not supported by reasoned medical opinions"); *Melnyczenko v. Bodnar*, 1989 WL 9345 (E.D. Pa. 2/7/89) ("Plaintiff cannot rely on his own conclusions about medical matters which he is not competent to make").

Aside from Rambo's own incompetent conclusions, Rambo only attempted to document his claim of broken ribs by submitting a bill which the Seventh Circuit recognized as being unauthenticated, *Rambo v. Daley*, 68 F.3d 203, 206 (7th Cir. 1995), and, therefore, not competent to be considered as evidence in response to a motion for summary judgment. *Canada v. Blains Helicopters*, 831 F.2d 920, 925 (8th Cir. 1987) ("It is well-settled that unauthenticated documents cannot be considered on a motion for summary judgment").

Unlike *Johnson*, this case does not involve a dispute in the evidence requiring the Court to weigh testimony, judge credibility and invade the province of the jury. The issues presented by this appeal involve solely questions of law.

Whether Rambo submitted any competent evidence of fractured ribs is purely a question of law which can be resolved by reviewing established legal precedent. No

Under this Court's well-accepted precedent, and the Federal Rules of Civil Procedure, 28 U.S.C. Fed.R.Civ.P. 56(e), it was Rambo's obligation to produce admissible evidence to respond to defendants' motion for summary judgment. Rambo's failure to produce competent evidence is no different than if he had produced no evidence of broken ribs at all. Since a general factual dispute requires more than a scintilla of evidence or some metaphysical doubt, summary judgment cannot be denied and *must* be granted where, as here, a plaintiff lacks any evidence whatsoever.[8] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Ind. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Summary judgment is designed to "pierce the pleadings and assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Ind. Co. Ltd. v. Zenith Radio*, 475 U.S. 572, 587 (1986).

Once Rambo failed to show that he sustained anything more than a *de minimis* injury, defendants were absolutely entitled to summary judgment. The fact that the force claimed to have been used began after Rambo failed to cooperate and ended with the ultimate objective of placing him in defendants' car, and was accomplished only with minimal, if any, injury, cannot, as a matter of law, be viewed as a clear violation of established constitutional right. *Jones v. Webb*, 45 F.3d 178 (7th Cir. 1995) (officer who placed one arm around a minor's neck, grabbed the minor's left arm with his other hand, removed the minor

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[8] The Seventh Circuit's decision at bar is even in conflict with its prior decision in *Jones v. Johnson*, 26 F.3d 727 (7th Cir. 1994), *aff'd*, *Johnson v. Jones*, ___ U.S. ___, 115 S.Ct. 2151 (1995), where it stated: "Summary judgment is not a discretionary remedy. If the plaintiff lacks enough evidence, summary judgment must be granted."

who placed one arm around a minor's neck, grabbed the minor's left arm with his other hand, removed the minor from the premises, shoved him to the ground and placed a knee in his back is entitled to qualified immunity.); *Mark v. Coldwell*, 754 F.2d 1260, 1261 (5th Cir. 1985) (slaps to the face which caused no bleeding and required no medical treatment do not rise to such a level that redress may be had under § 1983); *Palmer v. Williamson*, 717 F.Supp. 1218, 1222 (W.D. Tex. 1989); *Moats v. Village of Schaumburg*, 562 F.Supp. 624, 629-30 (N.D. Ill. 1983) (rough arm twisting not sufficient).

Absent any competent evidence, plaintiff failed to support his contention that he sustained a clearly established constitutional violation. This Court should not allow its decision in *Johnson v. Jones* to serve as a mechanism by which appellate courts can avoid their obligation to decide qualified immunity appeals immediately and deny movants their rights to summary judgment, when the only issue involved is one that is purely a matter of law--whether any admissible evidence has been offered in opposition by the adverse party.

CONCLUSION

This Court should grant *certiorari* and review the Seventh Circuit's dismissal of defendants' appeal for lack of jurisdiction and reverse the same. This Court should either itself hold that the defendants are entitled to qualified immunity, or remand this case to the Seventh Circuit for its consideration of the denial of defendants' qualified immunity defense on its merits. In the alternative, this Court should, at a minimum, exercise its supervisory jurisdiction and remand this matter to the Seventh Circuit for its consideration and decision on the merits, based on the true claim of qualified immunity made and presented by

mischaracterization that the defendants in the status of private citizens are seeking qualified immunity.

Respectfully submitted,

_____

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QUESTIONS PRESENTED

In the

United States Court Of Appeals

For The Seventh Circuit

No.94-3441
HARVEY RAMBO,

Plaintiff-Appellee,

v.

JOHN DALEY and WILLIAM MCGINNIS,

Defendants-Appellants.

Appeal *from* the United States District Court
for the Northern District of Illinois, Eastern Division.
No.92 C 780-James B. Zagel, Judge.

Argued September 6, 1995-Decided October 27, 1995

Before Cudahy, Flaum, And Easterbrook, *Circuit Judges.*

FLAUM, *circuit Judge.* The plaintiff. Harvey Rambo, filed a § 1983 suit against the defendant police officers, John Daley and Wrniam McGinnis, alleging that the officers violated the Fourth Amendment by using excessive force while effecting his arrest. The district court denied the defendants' motion for summary judgment, based on a qualified inununity defense, and the officers filed an interlocutory appeal. We now dismiss their appeal for want of jurisdiction.

For the purposes of this appeal, we accept the plain-tiff's version of the facts and draw all reasonable inferences in

the plaintiff's favor. *Knox v. McGinnis,* 998 F.2d 1405, 1409 (7th Cir. 1993). At approximately 10:00 p.m. on April 5, 1991, officer John Daley was patrolling the streets in Burnham, Illinois when he encountered a car driven by Harvey Rambo. Although Rambo was driving normally, Officer Daley followed Rambo across the nearby border into Hammond, Indiana. Mter Daley followed Rambo for approximately half a mile, Rambo entered a parking lot and stopped his vehicle.

Officer Daley pulled into the parking lot, left his car, and asked Rambo if he could see Rambo's driver's license. In response to the officer's request, Rambo stated that because he was in Hammond, Indiana, he would only comply with directives from Hammond police officers. Burnham police officer William McGinnis then arrived. Daley and McGinnis arrested and handcuffed Rambo, but Rambo refused to enter the Burnham squad car, protesting that Daley and McGinnis lacked authority in Indiana. Rambo demanded that Daley and McGinnis request the assistance of a local police officer. Rambo maintains that, in response to his request, one officer punched him, thereby fracturing his ribs, while the other officer pulled him into the squad car by his hair. At no time during the arrest did Rambo attempt to flee or become physically aggressive towards the Burnham police officers.

After the arrest Daley and McGinnis drove Rambo back to Buniham, Illinois, where he was charged with driving under the influence of alcohol and resisting arrest. He was released from police custody the night of his arrest and later received treatment for numbness in his wrist and broken ribs.

II.

On appeal, the defendants challenge the district court's denial of summary judgment based on the defense of quali fied immunity. The defendants argue that the district court erred in two respects. First, the defendants assert that they are shielded by qualified immunity because courts have not clearly established that police officers who make arrests

outside their home state act under § 1983's "color of law" requirement. Second, the defendants contend that the plaintiff cannot prove a significant injury because Rambo has failed to produce competent evidence of his broken ribs. Defendants argue that qualified immunity should protect them because the lack of a significant injury demonstrates that the officers did not violate a clearly established constitutional right.

Under 28 U.S.C. § 1291, we have jurisdiction to hear appeals oniy from "final decisions" of district courts. Given this statute, interlocutory appeals are the "exception" and not the "rule." *Johnson v. Jones,* 115 S. Ct. 2151, 2154 (1995). However, one large "exception" allows public officials asserting a defense of qualified immunity to appeal the denial of summary judgment where the issue on appeal is limited to "whether or not certain given facts show[] a violation of 'clearly established' law." *Johnson,* 115 S. Ct. at 2155; *accord Mitchell v. Forsyth,* 472 U.S. 511(1985).

A.

Under the objective standard articulated by the Supreme Court, public officials performing discretionary functions are entitled to qualified immunity unless their conduct violates "clearly established statutory or consititutional rights of which a reasonable person would have known." Harlow v. Fitazgerald, 457 U.S. 800, 818 (1982). Daley and McGinnis contend that htey are sheltered by qualified immunity because, when they arrested Rambo, the law was not clearly established that their actions were under color of state law. The defendants take the position that they were acting as private citizens, rather than Illinois police officers, when they arrested rambo in Indiana. Since a constituional violation requires state action, the defendants maintain that they could not have violated a clearly established consitutional right.

As *Johnson* clarified, *Mitchell* permits interlocutory appeals only where the defendant is a public official asserting a defense of qualified immunity. *Johnson,* 115 S. Ct. at 2155; *Mitchell,* 472 U.S. at 527-28. Defendants cannot assert a defense of qualified immunity, thereby invoking our jurisdiction under *Mitchell,* by claiming that they acted as private citizens. See *Nelson v. Streeter,* 16 F.3d 145, 149 (7th Cir. 1994) (holding that the defendants' argument that they acted as private citizens was "not properly before us" on interlocutory appeal).

The defendants' contention that they acted as private citizens when they arrested Rambo is inconsistent with their qualified immunity defense. Qualified immunity was designed to prevent the "distraction of officials from their governmental duties." *Harlow,* 457 U.S. at 816. The purpose of qualified immunity is "to safeguard government, and thereby to protect the public at large, not to benefit its agents." *Wyatt v. Cole,* 504 U.S. 158, 168 (1992). Because of its narrow policy justifications, qualified immunity, as articulated in *Harlow,* is not available for private defendants who have acted under color of law. *Wyatt,* 504 U.S. at 168-69. Similarly, qualified immunity cannot protect public defendants, as in this case, who claim they have acted as "private citizens" rather than "public officials."

The defendants' argument closely parallels the one we recently rejected in *Nelson.* The defendants in *Nelson* argued that qualified immunity shielded them from liability because they had acted as private citizens when they committed the alleged constitutional violations. We concluded that "[if the defendants were not acting under color of state law, that is, as officials, they are not entitled to official immunity. Official immunity is for officials." *Nelson,* 16 F.3d at 149. Qualified immunity is simply unavailable to protect actions of government officials that are taken in their "private" and not their "official" capacity. Defendants cannot claim that they acted as private citizens while simultaneously seeking shelter under a doctrine that

only protects public officials. Because the defendants' defense of qualified immunity is inconsistent with their contention that they did not act under color of state law, we cannot reach the merits of their argument.[1]

B.

The defendants next contend that the plaintiff has failed to produce competent evidence of his broken ribs. The plaintiff submitted an affidavit stating that he sustained broken ribs and an unauthenticated medical bill documenting his treatment for broken ribs. The appellants argue that this evidence is insufficient to support the district court's finding, for purposes of summary judgment, that the plaintiff suffered broken ribs. Under the defendants' version of the facts, only limited force was applied to compel the plaintiff to enter the police vehicle. Given the lack of any significant injury to the plaintiff, the defendants argue that their actions were objectively reasonable under the Fourth Amendment. Therefore, the defendants conclude, they could not have violated any clearly established constitutional right.

In *Johnson v.* Jones, the Supreme Court stated that jurisdiction under *Mitchell* extends (only to "whether or not certain given facts show[] a violation of 'clearly established' law." 115 S. Ct. 2151, 2155 (1995). Thus, we do not have jurisdiction to hear disputes regarding "which

[1] We have used the terms "private citizens" and "public officials who do not act under color of law" interchangeably only for the pwposes of this appeal. We note that in the related criminal case against Rambo, the defendants were found to have acted as "private citizens" when they arrested Rambo. The district court concluded that the "color of law" requirement under § 1983 was distinct from the private citizen determination made in the earlier proceeding. Because we do not reach the merits, we express no opinion regarding the preclusive effect of the prior ruling or the district court's construction of the "color of law" requirement.

facts the parties might be able to prove." *Id.* Our prior precedent, consistent with *Johnson,* holds that we lack jurisdiction over a qualified immunity appeal that turns on a disputed factual issue. *Estate of Starks v. Enyart,* 5 F.3d 230, 232-33 (7th Cir. 1993); *Hill v. Shelander,* 992 F.2d 714, 716 (7th Cir. 1993); *Elliott v. Thomas,* 937 F.2d 338, 342 (7th Cir. 1991). Therefore, if the defendants would not be entitled to qualified immunity under the plaintiff's version of the facts, we must dismiss the interlocutory appeal for want of jurisdiction. *Estate of Starks,* 5 F.3d at 233; *Hill,* 992 F.2d at 716.

The defendant police officers are protected by qualified immunity if "a reasonable officer could have believed [the action taken was] lawful, in light of clearly established law and the information the officers possessed." *Anderson v. Creighton, 433* U.S. 635, 641 (1987). Under the Fourth Amendment, we look at the objective reasonableness of the police officers' actions to determine whether they used excessive force in effecting the arrest. *Graham v. Gonnor,* 490 U.S. 386 (1989). The defendants do not contend, nor could they, that under the plaintiff's version of the facts their actions could be considered objectively reasonable. The Constitution clearly does not allow police officers to force a handcuffed, passive suspect into a squad car by breaking his ribs. According to Rambo, he did not attempt to flee or physically resist Daley and McGinnis. Rambo merely asked the Illinois police officers, who were outside of their jurisdiction, to call for Indiana assistance. In response, Daley and McGinnis punched Rambo hard enough to fracture two of his ribs and pulled Rambo into the squad car by his hair. These actions were clearly not objectively reasonable under the Fourth Amendment's *Graham* standard.[2] No reasonable police officer could have

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[2] The defendants also argue that their actions were objectively reasonable as a matter of law because of the plaintiff's failure to produce competent evidence of a significant injury. However, our court has clearly held that significant injury is not required for Fourth Amendinent excessive force claims under *Graham Titrann v. Ackman, 893* F.2d 145,147(7th Cir. 1990). Regurdless, this legal argument could not impact our conclusion. The plaintiff's

believed that the force used by the defendants was lawful.

Instead of presenting a legal issue on appeal, the defen-dants assert they applied "limited force" on Rambo, which caused an "insignificant injury." The defendants' argument rests completely on the alleged failure of the plaintiff to produce competent evidence of his broken ribs. The essential dispute, therefore, concerns whether the plaintiff's version of the facts is true. Mter the district court resolves this factual question and enters a fmal judgment, the defendants may appeal the district court's evidentiary rulings and factual determinations. However, on interlocu-tory appeal, the *Mitchell* exception does not allow us to hear disputes regarding which facts the parties might be able to prove at trial. *Johnson,* 115 S. Ct. at 2155. Indeed, the defendants' contention is indistinguishable from the precise factual issue we held unappealable in *Elliott v. Thomas.* In *Elliott,* the defendants argued that they did not use excessive force because the evidence was in-sufficient to conclude that they injured the plaintiff during his arrest. *Elliott,* 937 F.2d at 340. In the present case, Daley and McGinnis argue that they did not use excessive force because there is insufficient evidence to conclude that they broke Rambo's ribs. We simply do not have jurisdiction to review a contention of insufficient evidence on interlocutory appeal. *Johnson,* 115 S. Ct. at 2159. Therefore, because the merit of the qualified immunity defense turns on the sufficiency of the plaintiff's evidence, we dismiss this portion of the appeal for want of jurisdiction.

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injuries would certainly be significant under his own version of the facts.

We DISMISS the appeal for lack of jurisdiction.

A true Copy

Teste:

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Clerk of the United States
Court of Appeals for the Seventh Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HARVEY RAMBO,
Plainiff

No. 92 C 0780

v.

THE HONORABLE
JAMES B. ZAGEL

JOHN DALEY and WILLIAM
McGINNIS,
Defendants.

MEMORANDUM OPINION AND ORDER

This being the defendants' second motion for summary judgment, see Rambo v Daley, 851 F Supp 1222 (N D Ill 1994), I will not recite the facts. Two counts remain in Rambo's complaint--one claiming that the defendants violated his Fourth Amendment rights by effecting a seizure through the use of excessive force, and a state law claim for malicious prosecution. The defendants seek summary judgment on both.

Excessive Force

On their first motion for summary judgment, I rejected the defendants' argument that, because they had pursued Rambo across the state line, they were not acting under color of law when they apprehended him in Hammond, Indiana. Id at 1224-27. Now, they argue that qualified

Indiana. Id at 1224-27. Now, they argue that qualified immunity shields them because, at the time they acted, courts had not settled whether police officers acting outside their home state act under color of law.

The argument turns qualified immunity on its head. The defendants claim immunity because they could have reasonably believed they were acting as private citizens and, therefore, could not violate Rambo's Fourth Amendment rights. In other words, they claim that qualified official immunity protects their decision to act beyond the scope of their authority. It does not. Qualified immunity protects public officials merely as a means to an end; its purpose is "to safeguard government, and thereby to protect the public at large, not to benefit its agents." Wvatt v Cole, 112 S Ct 1827, 1833 (1992). It applies to public officials acting "within the scope of their responsibilities," in order to promote "principled and conscientious governmental decisonmaking," unclouded by fear of civil liability. Coleman v Frantz, 754 F2d 719, 726 (7th Cir 1985). See also Donovan v City of Milwaukee, 17 F3d 944, 951-52 (7th Cir 1994) (by shielding from civil liability "all but the plainly incompetent or those who knowingly violate the law," qualified immunity safeguards a police officer's ability to make difficult decisions while performing discretionary duties "with independence and without fear of consequences"). Qualified immunity does not apply to private citizens acting under color of law, Wyatt, 112 S Ct at 1833; Sherman v Four County Counseling Center, 987 F2d 397 (7th Cir 1993), nor to public officials who should have known they were acting outside their official capacity, Merrit v Mackey, 827 F2d 1368, 1373 (9th Cir 1987) (government officials who knowingly act "outside the scope of their authority" are not entitled to official immunity). See also Joseph G. Cook and John L Sobieski Jr., 1 Civil Rights Actions 1 2.06(B) n

The purpose of Sec. 1983 is "to deter state actors from using the badge of authority to deprive individuals of their federally guaranteed rights." Wyatt, 112 S Ct at 1830. The defendants are not shielded from liability for such conduct just because they reasonably could have thought they were acting beyond their authority--in other words, beyond the scope of their immunity.

As an alternate ground for gualified immunity, the defendants argue that even if their seizure of Rambo was unreasonable, their specific conduct had not been previously held to violate the Fourth Amendment. They cite Donovan v City of Milwaukee, 17 F3d 944 (7th Cir 1994), in support. In that case, two fleeing felons died when a police officer in pursuit intentionally struck the motorcycle they were riding with his squad car. On appeal, the plaintiff contended that Tennessee v Garner. 471 US 1 (1985), established a right to be free from police seizures accomplished through the use of deadly force unless the suspect posed a threat of serious physical harm. The Seventh Circuit, following Adams v St. Lucie Sheriff's Dep't, 998 F2d 923 (11th Cir 1993) (en banc)[1], concluded that whether a "deadman roadblock" constitutes a Fourth Amendment seizure was unsettled, and thus the officer could not have known that his actions violated a clearly established constitutional right to be free from unreasonable seizures. Donovan held that qualified immunity protects an officer from liability for unreasonable seizures unless the law has clearly established that his conduct constituted a seizure.

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[1] The court adopted Judge Edmondson's dissenting opinion in Adams v St. Lucie Sheriff's Dep't, 962 F2d 1563, 1573 (11th Cir 1992).

The defendants do not dispute that they seized Rambo; they claim that prior case law has not clearly established that their method of doing so was unreasonable. Although the federal courts are divided over this issue and the Seventh Circuit law seems unclear, the defendants may have a point. See Liebenstein v Crowe, 826 F Supp 1174, 1184-85 (E D Wis 1992). But qualified immunity in this context would only mean that if any reasonable police officer could have believed at the time that the force used by the defendants was reasonable, they are of f the hook. Id at 1186. Given Rambo's sworn statements in the record, I cannot conclude that any reasonable officer could have believed this.

Rambo says he was driving normally and was not intoxicated when he pulled into a liquor store parking lot in Hammond, Indiana. He observed a police car pull in behind him, but saw no lights and heard no siren. He says that he did not run from the officers nor physically resist them, but that they handcuffed him and ordered him into their squad car. He refused to get in because they lacked authority in Indiana, and he demanded the defendants call for a local police officer. According to Rambo, instead of doing this, one officer punched him hard enough to fracture two of his ribs (although Rambo's evidence of injury is quite thin) and then pushed him into the car while the other officer went around to the other side and pulled him in by his hair.

At the time, Rambo was handcuffed and, he says, offering only passive resistance to their orders. Police officers are trained in a variety of methods for compelling the compliance of such subjects. The officer is under no obligation to choose the least aggressive, but his constitutional obligation to refrain from using unreasonable force limits his choices, especially where, as here, there is

a snap decision in the heat of the moment. Even assuming that some punches would have been within the range of force that a competent officer might have thought reasonable, not all punches would be. A punch intended to double over a passive handcuffed suspect in a parking lot need not carry the force of a punch intended to subdue a suspect presenting an immediate threat.

Malicious Prosecution

Finally, the defendants move for summary judgment on Rambo's malicious prosecution claim, arguing that they had probable cause to charge him with driving under the influence and resisting arrest. In malicious prosecution cases, whether the circumstances offered to establish probable cause actually were the case is a question of fact, but whether those circumstances constitute probable cause is a question of law for the court. Ely v Nat'l Super Markets. Inc., 500 NE2d 120, 124 (Ill App 1986).
As the basis for charging Rambo with driving under the influence, the defendants claim that he was driving in the wrong traffic lane and swerving across lanes. But Rambo says he was driving in a normal manner, not swerving.

Moreover, he alleges that the officers failed to conduct any field sobriety tests or any other test to determine whether he was intoxicated. As the basis for charging Rambo with resisting arrest, the defendants offer Rambo's failure to yield when Officer Daley gave chase in his squad car with lights and siren. Rambo denies this. Rambo's sworn statements create factual issues for trial, although there is little doubt that if the officers' version of the facts prevails, the circumstances surrounding Rambo's arrest will constitute probable cause for charging him.

arrest will constitute probable cause for charging him.

Conclusion

The defendants' motion for summary judgment is denied in full.

Enter:

United State District Judge

Date: 1 Sep 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HARVEY RAMBO,
Plaintiff,

v.

No. 92 C 0780
JOHN DALEY and
HONORABLE JAMES B. ZAGEL
WILLIAM MCGINNIS,
Defendants.

MEMORANDUM OPINION AND ORDER

Shortly before ten o'clock on the night of 5 April 1991, Police Officer John Daley was patrolling near the intersection of Brainard and Burnham Avenues in the Village of Burnham, Illinois. At the intersection, he observed "an older model Chevy" coming toward him in the wrong traffic lane. Officer Daley gave chase with lights flashing and siren blaring. The Chevy refused to yield, swerving across lanes as it raced ahead. Roughly one-half to three-quarters of a mile from where the chase began, the Chevy crossed some railroad tracks and pulled into a liquor store parking lot--having travelled approximately one hundred feet past the Illinois border into Hammond, Indiana.

Officer Daley pulled into the lot, exited his car, approached the Chevy's driver, and asked to see his license. The driver, Harvey Rambo, told the officer that, having crossed the state line, he would comply only with directives from Hammond police officers. Burnham Police Officer William McGinnis subsequently arrived on the scene. Daley and McGinnis arrested Rambo, but Rambo refused to

get into the Burnham squad car, stating that the officers had no right to interfere with him in Indiana. The officers handcuffed Rambo and, according to the amended complaint, forced him into the squad car by pushing and shoving him, pulling his hair, punching him in the ribs, and repeatedly striking him. Rambo claims that, having asked the officers to summon the Hammond police, he was neither attempting to flee nor resisting arrest and did nothing else to provoke the officers' use of force.

The officers drove Rambo back to Illinois, to the Burnham Police Department, where they charged him with driving under the influence of alcohol and resisting arrest. Rambo alleges that he repeatedly requested access to medical treatment for injuries sustained during his arrest and that Daley and McGinnis rejected these requests. As a result, he says that he was forced to suffer those injuries--which the amended complaint fails to identify--without medical care until released from custody and taken by his wife to the St. Margaret Hospital Emergency Room in Hammond. He arrived there at 12:02 a.m. on 6 April 1991, two hours after his arrest. At St. Margaret's, Rambo complained of numbness in his left hand and wrist, to which an ace bandage was applied. He was discharged at 1:20 a.m. He now claims that he suffered also from broken ribs.

In Count I of this complaint, Rambo claims that Daley and McGinnis, under color of state law, used excessive force against him and owe him damages under 42 USC S 1983. Count II is a pendant Illinois law claim for malicious prosecution. Count III s another S 1983 claim, this time for denial of medical care. The defendants seek dismissal under Rule 12(b)(6), and summary judgment under Rule 56(b) on the federal claims. Should they prevail, they ask this court also to relinquish jurisdiction

over the pendant state law claim.

Summary judgment is appropriate if, after drawing all reasonable inferences in favor of the non-moving party, the court concludes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FRCP 56(c); Anderson v Liberty Lobby, Inc., 477 US 242 (1986). A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson, 477 US at 248.

Defendants claim they were not acting under color of law when they allegedly used excessive force to arrest Rambo because they had no actual authority to arrest Rambo in Indiana.[1] Section 1983 creates liability only for persons acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . ."

Applying similar language to an excessive-force claim in Screws v United States, the Supreme Court recognized that "under color of law" was not coextensive with actual authority:

> It is clear that under 'color' of law means under pretense of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the

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[1] In their summary judgment motion, Daley and McGinnis essentially repeat the arguments regarding Count I in their motion to dismiss.

> words 'under color of law' were hardly apt words to express the idea .

Screws v United States, 325 US 91, 111 (1944) (emphasis added) .

In Monroe v Pape, 365 US 175 (1961)[2], the Supreme Court reaffirmed that Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." Id at 172. And again, in Lugar v Edmondson Oil Co., 457 US 922, 929 (1982), the Court held that an officer acts under color of law if he is clothed with the authority of the state, and is purporting to act under that authority, even if he misuses or abuses that authority .

On the other hand, Daley and McGinnis cite Gibson v City of Chicago, 910 F2d 1510, 1518 (7th Cir 1990), where the Court of Appeals held that an officer's actions were not under color of law because his department had effectively suspended him prior to those actions. The court emphasized language from Screws in which the Supreme Court acknowledged that it was not confronting the case of an officer completely stripped of authority. Id at 1518-19.

In short, Daley and McGinnis argue that once they crossed into Indiana, they stood in the same position as the suspended officer in Gibson: they lacked all authority to act as police officers. Rambo counter-argues that Daley and McGinnis acted in their capacity as Burnham police officers when they arrested him, and therefore acted under color of state law, although they overstepped their

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[2] Monnell v Dep't of Social Services, 436 US 658 (1978), overruled Monroe on other grounds.

authority. The arguments present an interesting issue of characterization.

Daley and McGinnis rely heavily on Firman v Abreu, 691 F Supp 811, 813 (S D NY 1988). New York State Trooper Angel Abreu approached Martin Firman in his car at an exit on the Connecticut Turnpike. The trooper asked Firman for his driver's license and registration. Firman refused, informed the Trooper that he was beyond his jurisdiction, requested local police assistance, and then drove away. Abreu pursued and attempted to arrest Firman, who alleged the trooper assaulted him in the process. Firman was eventually apprehended and brought to a police station in Greenwich, Connecticut.

Judge Sprizzo found that Firman failed to establish that Abreu had acted under color of state law: "Although it is true that state officials can act under color of state law even if they overstep their authority, that rule can have no application where, as here, the official has no colorable authority to act in the jurisdiction in which he purports to act." 691 F Supp at 813 (citations omitted). Judge Sprizzo found that Abreu acted without actual or apparent authority because "all acts took place in Connecticut where Abreu had no authority to act" and "the plaintiff did not believe at the time of the acts in question that defendant Abreu was acting pursuant to state law." Id. Some important distinctions make the color-of-law assertion much stronger in the present case. Abreu's encounter with Firman began and ended in Connecticut, outside Abreu's jurisdiction. The pursuit and apprehension of Rambo began and ended in Burnham Village, Illinois, at the heart of Daley's and McGinnis's jurisdiction. It seems guite clear, therefore, that Daley and McGinnis were acting as Burnham police officers; they pursued Rambo for an infraction committed in Burnham, and, having arrested him in Hammond, they brought him back across the state line for processing.

This case bears a closer resemblayice to United States V Brzozowski, 281 F Supp 306 (E D Pa 1968). Brzozowski alleged that two men identifying themselves as police officers from Ridley Township, Pennsylvania apprehended him in Brooklyn, New York and forcibly transported him back to Ridley Township. Noting that the officers identified themselves as Ridley Township police officers and either displayed or alluded to a warrant, Judge Davis concluded that the officers "adequately demonstrated that they were pursuing an activity under color of state action." Id at 311.

Moreover, unlike Firman or Brzozowski, the defendants here were in hot pursuit of Rambo when they crossed state lines. Illinois officers in hot pursuit do have some authority to chase suspects into Indiana and make arrests there:

> Any member of a duly organized state, county -or municipal peace unit of another state who enters this state in fresh pursuit, and continues within this state in such fresh pursuit of a person in order to arrest him on ground that he is believed to have committed a felony in the other state, shall have the same authority to arrest and hold such person in custody as any law enforcement officer of this state . . . .

Indiana Code 35-33-3-1. Thus, Rambo's allegations present a stronger case than even Brzozowski for characterizing the defendants as officers who "misused" or "overstepped" their actual authority, rather than as the effective equivalents of suspended officers .[3]

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[3] Daley and McGinnis disagree because the officers in Brzozowski presented a warrant when they made their arrest. "Because it is solely a police function to serve and execute warrants, a function that cannot be performed by

precise result, seems hard to square with Screws, Monroe, and Lugar. He offers no reason why an active-duty police officer who makes an arrest using improper means--for example, excessive force--acts under color of state law, while an active-duty police officer who makes an arrest in an improper place--outside his jurisdiction--does not.[4] In

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execute warrants, a function that cannot be performed by ordinary citizens, the Brzozowski case has little relevance to the citizen's arrest undertaken by the defendants in the case at bar." Although in one sense Daley and McGinnis also did something a private citizen could not do--they used an official squad car to apprehend Rambo and transport him back to Illinois--that is not really the right question. When an officer makes an arrest within his jurisdiction, he acts as a representative of the state, even though a private citizen might have made the same arrest. The distinction between the officer and the citizen making an arrest is not what each does, but whether each acts as a holder of governmental authority. Since the private citizen has no such authority, the citizen cannot abuse it. The officer can.

[4] The authorities cited in Firman do not provide the missing analysis. Triplett v Azordigan, 570 F2d 819, 823 (8th Cir 1978), concerned a prosecutor outside his jurisdiction who failed to act to protect the applicant's rights Askew v Bloemaker, 548 F2d 673, 677 (7th Cir 1976), found that a state officer had no S 1983 liability for actions taken while acting as a federal officer. The court did say that "the actions of this 'dual-status' agent were necessarily taken pursuant to federal authority, for he could not have acted under color of state law . . . in Collinsyille Illinois, as it was outside his jurisdiction as a St. Louis police officer." But the issue before the court was whether the officer acted under color of state or federal law, not whether he acted under color of law or as a private citizen. The court had much evidence before it suggesting that federal authorities

both cases we have an officer who, possessing state-conferred authority, oversteps it in the course of performing a police function.

Gibson recognized that acts committed by an on-duty police officer are under color of law if they are in some way "related to the performance of police duties." Gibson, 910 F2d at 1516. See also Murphy v Chicago Transit Authority, 638 F Supp 464, 467-68 (N D Ill 1986) ("a person acts 'under color of state law' when he engages in conduct that is related to state authority conferred on the person, even though that authority does not in fact permit the conduct"). The patent distinction between Gibson, on the one hand, and both Firman and this case, on the other, is that the City of Chicago ordered Gibson not to perform any police duties. At the moment he acted, Gibson completely lacked the power or authority to perform police duties anywhere; he represented no governmental entity. By contrast, in Firman and the present case, the defendants never lost their status as active-duty police officers within their jurisdictions. In both cases, the defendants undertook conduct related to performance of their police duties, although more clearly so in the present case than in Firman.

In order to reconcile Nonroe with Gibson, courts

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controlled the officer when he engaged in the conduct complained of. It therefore did not have to, and did not, undertake an analysis of the question before this court. Chicago's Last Dep't Store v Indiana Alcoholic Beverage Comm'n, 161 F Supp 1, 4-5 (N D Ind 1958), cited by Firman and Askew, predates Monroe and makes no attempt to reconcile its holding with Screws. Wallace v Chrysler Credit Corp., 743 F Supp 1228, 1235 n 11 (W D Va 1990), simply follows the conclusory holding in Firman without further analysis.

must focus on an officer's status and possession of general authority to act as police officer and the nature of his actions, but not on his specific authority for particular actions. This is, essentially, the approach Judge Davis adopted in Brzozowski. See also United States v Trunko, 189 F Supp 559, 562-63 (E D Ark 1960). The officers in that case had no authority to effect an arrest in New York State, but they did assert their authority as active-duty Ridley Township police officers, a status they actually held. Thus, reconciling Gibson with Monroe suggests the following rule:

If you are an active-duty police officer, specially authorized by virtue of that status to carry a badge and a gun and to act like a police officer, then if you do act like a police officer you may well be acting under color of state law even if you lack actual authority for your specific actions, no matter how, why, or where you act. Given Monroe's discussion of "under color of law," there may be no principled distinction between kicking in a door without a warrant and making an arrest on the wrong side of a state boundary.

As for the plaintiff's awareness of the officers' lack of jurisdiction, a feature that this case and Firman share, it hardly seems relevant. Section 1983 creates a federal remedy for infringement of federal rights by states and their officers because "by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies." Monroe, 365 US at 180. I see no reason to deny Rambo this remedy simply because he may have understood the limits of an Illinois police officer's jurisdiction better than Daley and McGinnis. Liability under S 1983 is not predicated on detrimental reliance.

The officers also raise a collateral estoppel defense based on Judge Szwed's finding during the criminal proceedings against Rambo that Daley and McGinnis lacked authority to arrest him and therefore acted as "private citizens." People v Rambo, Dkt No 92 MC6-003031 (Cir Ct Cook Cty, 31 Mar 1993) (Preliminary Hearing). Given the foregoing analysis, the reason this arguiuent fails is manifest. In the criminal context, Judge Szwed faced the question of actual authority. Here, the issue is whether Daley and McGinnis acted under color of state law, which they could have done absent actual authority to arrest Rambo in Indiana.

To more fully assess the officers' situation in the liquor store parking lot, it seems worth noting that Daley and McGinnis had no constitutional duty to prevent Rambo from re-entering his car in Hammond. In Reed v Gardner, 986 F2d 1122 (7th Cir 1993), Judge Flaum's majority opinion addressed a situation where a police officer might subject himself to S 1983 liability by nQt removing an intoxicated driver from an automobile. Reed alleged that police officers knowingly took into custody a sober driver, leaving the ignition keys and an obviously drunk passenger behind in the car. This passenger slid behind the wheel and, approximately two hours later, crossed the center line and collided head on with Reed. Taking all these allegations as true, Judge Flaum concluded that Reed had stated a claim against the officers under 5 1983: "By removing a safe driver from the road and not taking steps to prevent a dangerous driver from taking the wheel, the defendants arquably changed a safe situation into a dangerous one." Id at 1127. Because the officers' actions changed the status quo to the detriment of public safety, they were not shielded by DeShaney v Winnebago Countv Dep't of Social Services, 489 US 189 (1989). See also

Ross v United States, 910 F2d 1422, 1431 (7th Cir 1990) (distinguishing DeShaney where county alleged to have policy of "cutting off private sources of rescue without providing a meaningful alternative"). The officers here would not have changed the status quo by failing to arrest Rambo, nor would such an omission have constituted action under state law. See Triplett v Azordipan, 570 F2d 819, 823 (8th Cir. 1979) (prosecutor outside his jurisdiction had no duty to come forward with exculpatory information at appellant's trial). Had Rambo proceeded to run down, say, several members of the Edmund Burke society hitching their way to an Iron John retreat in the Indiana wilderness, Daley and McGinnis would have no S 1983 liability to the Burkeans.

However, the Deshaney limitation on constitutional liability fortunately does not define the limits of conscience for most police officers. Had Daley and McGinnis, believing Rambo thoroughly stewed, simply returned to Illinois, leaving the drivers and pedestrians of Indiana to fend for themselves, we might be justifiably disappointed, or even appalled. But like any citizens encountering such a situation, Daley and McGinnis were obliged to proceed in a lawful manner. Whether they did will now be a matter for trial.

As to Count III, the defendants contend they are entitled to summary judgment because they were not deliberately indifferent to Rambo's medical needs during Rambo's detainment after his arrest. Punishment prohibited by the due process clause of the fourteenth amendment includes deliberate indifference to the serious medical needs of pretrial detainees. Brownell v Figel, 950 F2d 1285, 1289 (7th Cir 1991); Salazar v City of Chicago, 940 F2d 233, 237-242 (7th Cir 1991). "Deliberate indifference" is a synonym for reckless or intentional conduct; that is,

"conduct that is so dangerous that the defendant's knowledge of risk can be inferred." Brownell, 950 F2d at 1290. Turning first to an apparent procedural blunder, Rambo has failed to file the statement required by Local Rule 12(n). The rule provides that "[a]ll material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the moving party." The Seventh Circuit has repeatedly upheld strict application of Rule 12(n). See, for example, Brown v United States, 976 F2d 1104, 1108 (7th Cir 1992); Schulz v Serfilco. Ltd., 965 F2d 516, 519 (7th Cir 1992). Even putting this failure aside, Rambo still has the burden to produce evidence establishing each element of his case. Greater Rockford Energy and Technology Corp. v Shell Oil Co., 998 F2d 391 (7th Cir 1993). He may not merely stand on his pleadings, but must allege specific facts which demonstrate that a genuine issue of triable fact exists. Celotex Corp. v Catrett, 477 US 317 (1986).

Rambo submits no sworn affidavits or deposition testimony. His only evidence is a bill indicating that four days after his release from the emergency room at St. Margaret's, diagnostic treatment at the Whiting Clinic indicated that he had fractured ribs. But while this document suggests that Daley and McGinnis may have fractured Rambo's ribs during the arrest, it provides no reason to believe they had any way of knowing this, and neither does Rambo's unsworn allegation that he repeatedly requested medical assistance after the arrest. Rambo never even alleges that he complained of a specific injury.

In fact, by failing to contradict the defendants' 12(m) statement, Rambo effectively admits that St. Margaret's released him after treating his wrist only, The evidence therefore suggests, without contradiction, that if Rambo suffered rib fractures during the arrest, these

injuries went undetected by emergency room personnel at St. Margaret's, and were in fact so subtle that Rambo did not seek further treatment for several days. In sum, Rambo presents no evidence that Daley and McGinnis had reason to suspect that he might be seriously injured, or that his injuries were in any way exacerbated by the delay in gaining treatment.

As to Count I, the defendants' motion to dismiss and motion for summary judgment are denied. The motion for summary judgment is granted as to Count III; the motion to dismiss Count III is, therefore, denied as moot. Since Count I survives, the court retains supplemental jurisdiction over the common law claim for malicious prosecution in Count II.

Enter:

United State District Judge
Date 10 May 1994

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
December 15, 1995

HON. RICHARD D. CUDAHY, Circuit Judge

HON. JOEL M. FLAUM, Circuit Judge

HON. FRANK H. EASTERBROOK, Circuit Judge

HARVEY RAMBO,] Appeal from the United
Plaintiff-Appellee,] States District Court
] for the Northern
v.] District of
No.94-3441] Illinois, Eastern
] Division.
JOHN DALEY and]
WILLIAM MCGINNIS,]
Defendants-Appellants.] No.92 C 780
]
] James B. Zagel,
] Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause on November 13,1995, by defendants-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for

rehearing and suggestion for rehearing in banc be, and the same is hereby DENIED.

(2)

Supreme Court, U.S.
FILED
APR 8 1996
CLERK

No. 95-1499

IN THE

Supreme Court of the United States

October Term, 1995

OWENS-CORNING FIBERGLASS CORPORATION,

Petitioner

v.

CLARENCE DUDLEY AND GEORGIANNA DUDLEY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF BY AMICUS CURIAE, THE STATE OF FLORIDA, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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12 pp

QUESTION PRESENTED

The State of Florida, as amicus curiae, believes the second of the two questions presented can be more accurately stated as follows:

WHETHER THE EXCESSIVE FINES CLAUSE APPLIES TO A STATE'S STATUTORILY-DERIVED SHARE OF PUNITIVE DAMAGES AWARDED IN LITIGATION BETWEEN PRIVATE PARTIES, WHEN THE ACTION IS NOT BROUGHT IN THE STATE'S BEHALF.

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No. 95-1499

IN THE

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October Term, 1995

OWENS-CORNING FIBERGLASS CORPORATION,

Petitioner

v.

CLARENCE DUDLEY AND GEORGIANNA DUDLEY,

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ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF BY AMICUS CURIAE, THE STATE OF FLORIDA, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The litigation below proceeded between private parties only. It was not brought in the State's name. The State of Florida's interest was inchoate until a jury awarded $8.25 million in punitive damages against Petitioner, Owens-Corning.

By operation of law, Florida is entitled to 35% of punitive damages awarded. § 763.78, Florida Statutes (1995). Petitioner separately challenges this share as an excessive fine. Florida's interest is in upholding the application of §768.73, thereby preserving its share of the award.

PARTIES INVOLVED

Neither the State of Florida nor any of its agencies was a party to the litigation below. No separate action has been maintained against Petitioner. Otherwise, Petitioner's list of parties is accepted.

Since Petitioner attacks the constitutionality of §768.73, Florida Statutes, the Attorney General of Florida was entitled to notice and service under this Supreme Court Rule 29.4(c). Counsel is not aware that such service was made.

Under Rule 37.5, the parties' consent to this amicus brief is not required.

SUMMARY OF ARGUMENT

The decision below does not warrant certiorari review under Rule 10.1(b) or (c). With regard to the second question presented (Florida's share of the punitive damages), the Second District Court of Appeal did not decide a federal question in a way conflicting with a decision by another state court of last resort or by this Court. The petition for certiorari does not allege such.

The question reserved by this Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 n. 21 (1989), is not presented. Florida was not injured in fact; it took no action to obtain the award of punitive damages. The plaintiffs below did not bring a suit in the name of the State to redress harm to the State, and did not share in an award of punitive damages made to the State.

Section 768.73, Florida Statutes, does not establish a cause of action to be brought by a private person on behalf of the State. Rather, it requires final judgments to allocate 35% of punitive damages to the State.

To the extent it attacks Florida's derivative share of punitive damages, the petition for certiorari must be denied. If the overall amount of punitive damages is proper under the U.S. Constitution, Florida's smaller share of that amount must also be constitutional, and cannot logically be "excessive."

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW, AND SHOULD BE DENIED.

The petition for writ of certiorari should be denied. With regard to Florida's share of punitive damages, the Second District Court of Appeal did not decide a federal question in a way conflicting with a decision by another state court of last resort or by this Court. The petition for certiorari does not allege such. To the contrary, Petitioner urges this Court to grant certiorari to answer the question of whether a state's share of punitive damages obtained by private parties can be construed as an "excessive" fine.

The petition should be denied for a second reason. Contrary to Petitioner's contention, the facts of this case do not present the question reserved in *Browning - Ferris, supra*. There, the Court discussed an earlier decision and said:

> We left open the question whether a *qui tam* action, in which a private party brings suit *in the name of the United States* and shares in any award of damages, would implicate the Double Jeopardy Clause. We leave the same question open for purposes of the Eighth Amendment's Excessive Fines Clause. [e.s.]

492 U.S. at 275, n. 21, *citing U.S. v. Halper,* 490 U.S. 435 (1989) [internal citations omitted].[1]

The critical phrase is "in the name of the United States."[2] Obviously, the federal government should not be able to escape the prohibition against excessive fines simply by allowing a private party to sue on its behalf. The same logic would apply to a state-level *qui tam* action and its modern counterpart, the "private attorney general" action. In either instance, a private party would be suing in the State's name, under a cause of action not available to individuals acting in their private capacity only.

In contrast, the litigation below always involved private parties only. The suit was not brought in Florida's name. At no time did the State enter the lawsuit.

Respondents' injuries arose from exposure to asbestos-containing products, including insulation manufactured by Petitioner. Florida was never injured in fact. Thus, the litigation below lacked an essential characteristic of a *qui tam* action—injury to the State or the government. See *U.S. v. Tribal Development Corporation,* 49 F.3d 1208 (7th Cir. 1995):

> So when a legislative body enacts provisions enabling *qui tam* actions, that act carries with it an understanding that in such suits it is the government, and not the individual relator, who has suffered the injury....

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1 In footnote 22 (492 U.S. at 275), the Court also declined to decide whether the Excessive Fines Clause "applied to the several States through the 14th amendment, [and]...whether the Eighth Amendment protects corporations as well as individuals." Based on Florida's argument herein, it is still not necessary to answer these questions.

2 A *qui tam* action is one in which the "plaintiff states he sues as well for the state as for himself." *Black's Law Dictionary* (revised 4th ed., 1968) at 1414.

Id. at 1212. See also, *U.S. v. University of Texas*, 961 F.2d 46, 49 (4th Cir. 1992) ("A *qui tam* relator...has no personal stake in the damages sought—all of which, by definition, were suffered by the government.").

In addition to Florida's lack of injury, there is the language of §768.73 itself. Nothing in that statute even intimates the creation of a cause of action, much less an action brought by private parties to enforce the law on behalf of the State. The award of punitive damages below cannot possibly be construed as the result of State action, or action on behalf of the State. Therefore, no *qui tam* action was prosecuted; and the question reserved in *Browning-Ferris* is not presented to this Court.

Florida's interest did not arise until punitive damages were awarded against Petitioner.[3] Under §768.73(2)(b), Florida Statutes (Pet., p. 120a–122a),[4] Florida is entitled to 35% of punitive damages awarded. However, the jury may not be "instructed or informed" of the State's share. §768.73(8). The State's award is not made until the final judgment, in which the "court shall order the percentages of the awards, payable as provided in subsection (2)." §768.73(3). The obvious inference is that the jury's award of punitive damages is based entirely on the jury's perception of the defendant's conduct, and not on the knowledge that the State will receive a share of the award. The State simply has no "presence" that could influence the award.

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3 Subsections 768.73(2)–(7) were repealed in 1992 by §3 of ch. 92-85, Laws of Fla., effective July 1, 1995. However, the Florida Attorney General recently opined these subsections still operate as to punitive damages awarded before that date. *See* Op. Atty. Gen. 96-15 (Feb. 28, 1996) (the Dept. of Banking and Finance has a duty to collect the state's share of punitive damages awarded by a verdict rendered before July 1, 1995).

4 The petition for certiorari will be cited as (Pet., p.__).

Nothing in §768.73 gives Florida standing to enter private litigation for purposes of obtaining punitive damages. The State cannot contest a private party's decision not to seek punitive damages; or a private party's decision to settle, before a verdict is reached, without obtaining punitive damages.

Even when a verdict awards punitive damages and the parties settle afterward, the State cannot contest the amount of the settlement.[5] All the State may do is insist on its "proportionate share" of the settlement amount. §768.73(4).

Consequently, there is no State action involved.[6] Florida has merely conditioned a private party's right to receive punitive damages upon payment of 35% to the State. Here, the plaintiffs below did not share in an award of punitive damages obtained in the State's name. In fact, the reverse is true. The State shared an award obtained by plaintiffs in their own names.

If both the award and amount of punitive damages are proper here, Florida's share could not have been an excessive fine. First, it was not a fine at all. It was but a share of an award, all of which would have gone to Respondents. Next, such share was 35% of the overall amount awarded by the jury. If that amount was constitutionally sound, then Flor-

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5 Once an award of punitive damages has become final, the State may intervene to protect its interest in its share. See *Gordon v. State*, 585 So.2d 1033, 1038 (Fla. 3d DCA 1991), *affirmed with opinion*, 608 So.2d 800 (Fla. 1992), *cert. den.*, 113 S.Ct. 1647 (1993) (trial court did not abuse its discretion by allowing state to intervene, when defendant moved to correct final judgment which mistakenly allocated all of punitive damage award to plaintiff).

6 See *Gordon*, *supra* note 5, 608 So.2d at 803 (observing, that under an earlier version of the statute at issue here, "the State did nothing to earn its sixty-percent share") (Shaw, J., dissenting).

ida's fractional share could not have violated the Eighth Amendment's prohibition against excessive fines.

A defendant's obligation to pay punitive damages arises when the verdict is rendered. At such time, there has been no State action. The State's entitlement to 35% of punitive damages vests later, upon the rendering of a final judgment. That the State later receives a portion of the punitive damage award has no bearing on the amount of the award initially.

In effect, Petitioner's second argument challenges how the total punitive damages award is allocated *after* the obligation to pay has been established. That argument overlooks the remedy. If Petitioner's argument were correct, the final judgment would be changed to allocate the entire punitive damage award to Respondents. Otherwise, Petitioner would escape its obligation to pay full punitive damages simply because one of two recipients was later held ineligible.

Consequently, this case does not warrant certiorari review as to Petitioner's second point. Should a private party sue and be awarded punitive damages in the name of a state, then the question of an excessive fine would arise. Until that time, there is no need for this Court to answer a hypothetical question.

CONCLUSION

The petition for certiorari must be denied. Alternatively, the petition should be granted only as to first question presented by Petitioner.

Respectfully submitted,

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